[2015] JMCA App 36

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 4/2008

APPLICATION NO 169/2015

BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE WILLIAMS JA (AG)

TAFARI WILLIAMS v R

Robert Fletcher for the applicant

Mrs Natalie Ebanks-Miller and Miss Theresa Hanley for the Crown

23 September 2015

ORAL JUDGMENT

MORRISON P (AG)

[1] By an application for court orders dated 22 September 2015, the applicant sought the following orders:

> "1. That he be granted an extension of time to apply for leave to appeal, as set out in Criminal Form B2 filed on January 15, 2008 in the Court of Appeal.
>
> 2. That his application for leave to appeal be granted.
>
> 3. That the court exercise its discretion, on the filing of his notice of abandonment, to make his sentence run

from the date of conviction and sentence, which is September 3, 2007 [sic].

4. Such other relief as the court deems fit."

[2] The affidavit sworn to by the applicant in support of the application on 22 September 2015 tells a sorry tale. On 13 September 2007, after a trial in the High Court Division of the Gun Court, the applicant was convicted of the offences of illegal possession of firearm and shooting with intent. For these offences, he was sentenced to terms of imprisonment of seven and 12 years respectively and the sentences were ordered to run concurrently.

[3] On 15 January 2008, the applicant filed applications for (i) an extension of time within which to appeal; and (ii) leave to appeal against the convictions and sentences. On 17 January 2008, in accordance with its usual practice, the registrar of this court wrote to the registrar of the Gun Court requesting a copy of the transcript of the evidence given at the applicant's trial in order to enable consideration of the matter. Up to the date of this judgment, despite several reminders, the transcript has still not been received in the registry of this court.

[4] Throughout this entire period, the applicant has remained in custody and is currently remanded at the Tower Street Adult Correctional Centre. It now appears that, had he commenced serving his sentences from the date on which they were originally imposed, the applicant would have become eligible, pursuant to rule 178 of the Correctional Institution (Adult Correctional Centre) Rules, 1991 (the rules), for release from prison on 12 September 2015. Being aware of this, the applicant now wishes to

abandon his application for leave to appeal and to avail himself of the facility for early release.

[5] However, he is faced with an obstacle. Having filed an application for leave to appeal and having remained in custody, he was subject to section 31(1) of the Judicature (Appellate Jurisdiction) Act (the Act), which provides that, pending the determination of his appeal, an appellant[1] must "be treated in such manner as may be directed by [the rules]". The result of this is that, as provided for by rules 189-199 of those rules, the applicant fell to be accorded special treatment within the correctional institution. Accordingly, the question of when time begins to run in relation to his sentence is governed by section 31(3) of the Act, which provides as follows:

> "The time during which an appellant, pending the determination of his appeal, is released on bail, and subject to any directions which the Court of Appeal may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under this section, shall not count as part of any term of imprisonment under his sentence, and, in the case of an appeal under this Act, any imprisonment under the sentence of the appellant, whether it is the sentence passed by the court of trial or the sentence passed by the Court of Appeal shall, subject to any directions which may be given by the Court as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into a correctional institution under the sentence."

[6] The upshot of all of this is that, in the absence of a direction from the court, the sentence of an appellant is deemed to begin to run as from the date upon which his

[1] Section 2 of the Act defines "appellant" to include "a person who has been convicted and desires to appeal under this Act".

appeal is determined and not before. In this case therefore, the applicant's sentences would not yet have begun to run, and will not do so until his appeal has been determined, unless this court gives a contrary direction. The only guidance provided in the Act as to what factors are to be taken into account in considering whether to give directions as to the date on which sentence shall be deemed to begin to run pursuant to section 31(3) is to be found in section 31(3A), which provides that the court "shall take into account any election made by the appellant under rules under the Corrections Act to forego any special treatment accorded to the appellant pursuant to those rules". However, in this case, since there is no evidence that the applicant made any such election, section 31(3A) is of no assistance.

[7] Accordingly, the question whether to give directions as to the date on which sentence shall be deemed to begin to run pursuant to section 31(3) in a particular case and, if so, what directions should be given, remains a matter entirely for the discretion of the court. In this regard, the danger of potential injustice to applicants/appellants arising from, not only delays in the production of the transcripts of their trials, but also the sometimes unavoidable delays in the actual hearing of appeals, is not a new one. Prior to November 2013, in recognition of this danger, the practice of the court was (i) in the case of a single judge refusing an application for leave to appeal, to direct that the sentence should run from a date six weeks after the original date of sentence; and (ii) in the case of a refusal of an application for leave to appeal by the court itself, to direct that the sentence should run from a date three months after the original date of sentence. This practice, although having no basis in either statute or common law, was

the court's attempt to mitigate any potential injustice caused by delays which were in no way attributable to the applicants/appellants themselves. The court's current practice, substantially influenced by the decisions of the Privy Council in **Tiwari (Leslie) v The State** [2002] UKPC 29, (2002) 61 WIR 452 and **Ali v Trinidad & Tobago** [2005] UKPC 41, is now to order that such sentences should in general run from the date of sentencing at trial. However, the matter remains ultimately a matter for the discretion of the court, to be dealt with in accordance with the circumstances of each case.

[8] There can be no question, in our view, that the circumstances of this case are such as to fully entitle the applicant to whatever favourable consideration the court is able to afford him at this time. By any standard, the delay of over eight years in producing the transcript of the applicant's trial in the Gun Court can only be described as outrageous. There is absolutely no suggestion that any part of this delay has been attributable to any fault of his. The result of this is that he has been denied his right to a fair consideration of his application for leave to appeal. It is plain from the affidavit which he has filed in support of this application that he remains concerned to establish his innocence. But he is now motivated by a desire to rejoin his family and to resume his life, rather than pursuing an appeal that has no clear end in view.

[9] So the only question which remains in this case is whether it is open to the court, upon the applicant abandoning the appeal, to give the direction which he now seeks, which is that his sentences should be reckoned as having commenced on 13 September 2007, the date on which they were originally imposed. Mr Fletcher, for whose

thoughtful and, as always, conscientious advocacy we are greatly obliged in this case, urged upon us rule 3.22(3)(a) of the Court of Appeal Rules, 2002. That rule provides that, upon receipt of a notice of abandonment filed pursuant to the rules, "the appeal is deemed to be dismissed". Such a dismissal ought to be treated in the same manner, Mr Fletcher submitted, as a dismissal of the appeal on the merits for the purpose of settling the date from which the sentences are to commence.

[10] But it seems to us that the problem with approaching the matter in this way (as Mr Fletcher ultimately accepted), is that rule 3.22(3)(a) appears to speak to a purely administrative consequence of the filing of a notice of abandonment, not calling for any intervention or action by the court itself. So we prefer to treat this as an application for a direction from the court as to the date from which the applicant's sentences should be reckoned, consequent upon the determination of his application for leave to appeal to be brought about by his abandonment of it. His wish to abandon the application is, as we have indicated, prompted by circumstances entirely beyond his control. In all the special circumstances of this case, therefore, we will make the following order:

1. The applicant is hereby granted an extension of time within which to appeal against his convictions and the sentences imposed in the High Court Division of the Gun Court on 13 September 2007.
2. It is hereby directed that, upon the applicant filing a notice of abandonment of his application for leave to appeal, his sentences are to be reckoned as having commenced on the date on which they were imposed, *viz*, 13 September 2007.